Supreme Court, U. S.
FILED
DEC 15 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977
No. 77-629

ASHBY LEACH, R. RAYMOND TWOHIG,
ROGER HURLEY,
Petitioners,

vs.

EUGENE SAWICKI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF OF PETITIONERS

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

In the Brief of Respondent in Opposition, Respondent raises an issue not discussed in the Petition, namely, that the Supreme Court of Ohio lacked jurisdiction over the mandamus action filed in that court by petitioners. Respondent apparently is suggesting that an independent state ground existed for the dismissal of the complaint for writ of mandamus, so that this Court should not, as requested, reach the federal constitutional issues.

Respondent's assertion that the Supreme Court of Ohio lacked jurisdiction is, however, contradicted by history, reason and law.

From the history of the instant action, *Pressley v. Industrial Commission of Ohio,* 11 Ohio St. 2d 141 (1967), the case relied on by Respondent, is inapposite. The portion of the Syllabus quoted by Respondent states that "neither the Supreme Court nor the Court of Appeals" has jurisdiction, yet Petitioners here did obtain a writ of mandamus from the Court of Appeals (pp. A5-A7 of the Appendix to the Petition herein) directed to the original, March 14 restrictive order. The Court of Appeals obviously recognized that this case did not involve the "injunction" issue discussed in *Pressley.* The Nebraska Supreme Court likewise recognized mandamus as the appropriate remedy in *State v. Simants,* 236 N.W.2d 794 (1975), *reversed sub nom. Nebraska Press Assoc. v. Stuart,* 427 U.S. 539 (1976).

Respondent suggests that neither the Court of Appeals nor the Supreme Court of Ohio had jurisdiction to review the restrictive order of March 18, implying that only the Court of Common Pleas was available to grant this "injunctive remedy". This nonsensical suggestion would have required Petitioners to seek an injunction against a judge of the Court of Common Pleas in that very court, so that reason, as well as history, is against Respondent.

Finally, that relief from Respondent's action could be obtained by petitioning the Courts of Appeals or the Supreme Court of Ohio for a writ of mandamus is hornbook law:

> "[M]andamus is the proper remedy to compel the performance of any act which an inferior court has jurisdiction to perform and no jurisdiction or discretion to refuse. . ." 35 OHIO JURISPRUDENCE 2d 371.

> "[T]he lower court or judge may be compelled to act in a particular way when the facts are not in dispute and the court has come to a wrong conclusion of law therefrom. . ." 35 OHIO JURISPRUDENCE 2d 375.

Pressley v. Industrial Commission, supra, 11 Ohio St. 2d 141, cited by Respondent, is a decision *upholding* the use of mandamus to compel the respondent to grant relator-employee's application for an award, despite the availability of injunctive relief in the Court of Common Pleas. The dictum quoted by Respondent in his Brief in Opposition is explained in *Pressley* at 11 Ohio St. 2d at 150, where the Court states that when an action merely seeks to "restrain and enjoin respondents rather than to compel respondents to perform a clear *legal duty*" (emphasis added), the action is one in injunction, not mandamus. Here, of course, as the Court of Appeals recognized when it issued the writ, a legal duty to obey the commands of the Constitution of the United States exists, and a "wrong conclusion" about what the Constitution commands may be corrected by mandamus.

Because, as shown above, the Supreme Court of Ohio had jurisdiction over Petitioners' mandamus complaint, and because, as will be discussed below, no adequate remedy at law existed, the dismissal of the complaint was clearly a decision on the merits, since these two, plus the "legal duty" element, are the conditions precedent to the consideration of a mandamus complaint; *Pressley v. Industrial Commission, supra,* 11 Ohio St. 2d 141, paragraph 5 of the Syllabus, explained at 11 Ohio St. at 160, and further clarified at 164.

Certainly, no adequate legal remedy existed. For example, neither disobedience nor appeal could have vindicated Petitioners' rights. Disobedience of the order would not have obtained review, since the constitutionality of

the order would have been irrelevant in a contempt proceeding; *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *State ex rel. Beil v. Dota*, 168 Ohio St. 315 (1958). Review by appeal was likewise unavailable, certainly to Petitioners Hurley and Twohig who were non-parties. Petitioner Leach's ability to test the order on appeal was little greater: first, he might not have been convicted; and, even if convicted, an assignment of the prior restraint as an error on appeal would have been a novel argument. Petitioners' *only* available remedy was thus mandamus.

In summary, because the Supreme Court of Ohio necessarily decided this case on its merits, not on procedural grounds, this Court should not be distracted in its decision on whether to grant review.

Respectfully submitted,

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